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ALEXANDER L. STEVAS,

No. 80-1613

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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CHARLES E. STARR and SOPHIE STARR, his wife,
*Petitioners,*

v.

JOHN A. PRING, SR.,
*Respondent.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the district court's finding that the defendant below breached the contract with plaintiff because of financial losses, and not because of alleged defects in an aircraft was "clearly erroneous" under Fed. R. Civ. P. 52(a).

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## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 12, 1980. The Petition for Certiorari filed within ninety days of that date initially was rejected, and was refiled on or about March 30, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

*Fed. R. Civ. P. 52(a)*
(Set forth in Petition for Certiorari at 5)

## OPINIONS BELOW

The unpublished opinions of the Ninth Circuit Court of Appeals and the District Court for the District of Idaho are set

forth in their entirety in the Appendix to the Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit filed in this case.

## STATEMENT OF THE CASE

Respondent sets forth the salient facts of this case because of certain inconsistencies and omissions in the Petition for Writ of Certiorari.

The plaintiff is the owner of a Cessna Model 414 twin-engine aircraft. On July 29, 1975, the parties entered into a written agreement whereby plaintiff agreed to lease the aircraft to defendant in consideration for minimum monthly rental payments of $1,900. The plane was to be used by defendant to establish a charter service between the cities of Coeur d'Alene and Boise, Idaho. Defendant, Charles E. Starr, inspected and flew the aircraft prior to taking possession and starting the charter service. In January or February of 1976, the defendants initiated the charter service between Coeur d'Alene and Boise, Idaho.

Defendants terminated the charter service after a three week experiment and in a letter to plaintiff admitted that the project was not financially feasible. Defendant stopped making payments under the lease agreement in June 1976.

At trial, defendant took the position that the reason he ceased performing was because the plane was not airworthy.

The District Court rejected defendant's position finding:

> After approximately three weeks of trial runs and unscheduled activity, it was abandoned for the reason that it proved to be economically unfeasible.

Petition for Certiorari, Appendix p. 4.

The Court further found that "the alleged dangerous condition caused by loose rivets was not the reason for the termination of the lease payments by the defendant." *Id.*, at 5. The aircraft

was, at all times, certified to be airworthy by the Federal Aviation Authority. *Id.* The Court entered judgment for the plaintiff in the amount of $69,013.49.

The Ninth Circuit Court of Appeals affirmed the judgment below holding that there was ample evidence to support the District Court's holding and it was therefore not "clearly erroneous." The Court further found that even if the craft were not airworthy, there was no failure of consideration under the decisional authorities of the Idaho Supreme Court. *Id.*, at 2. *Transamerica Leasing Corp.* v. *Van's Realty Co.*, 91 Idaho 510, 427 P.2d 284, 291 (1969).

## SUMMARY OF ARGUMENT

This case turns entirely on the finding of fact by the District Court that the defendant below ceased making payments under the lease because of financial losses, and not because of defects in the plane. This finding of fact is supported by competent evidence and is not "clearly erroneous" under Fed. R. Civ. P. 52(a) and must therefore not be disturbed on appeal.

Petitioners' attempt to characterize this case as one involving constitutional questions and Federal Statutes and regulations relating to air safety is, therefore, utterly without merit.

Even if the above finding of fact is "clearly erroneous," the Ninth Circuit correctly held that there was no failure of consideration under the decisional authorities of the Idaho Supreme Court.

## ARGUMENT

It has long been recognized by this Court that a trial court's findings of fact shall not be set aside unless "clearly erroneous" under Fed. R. Civ. P. 52(a), and that due regard shall be given to the trial court's opportunity to weigh conflicting testimony and judge the credibility of witnesses. *Graver Tank and Mfg.*

*Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949), *reversed on other grounds*, 339 U.S. 605 (1950). *See also United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948).

In the case before this Court there is ample evidence to support the district court's finding that defendant abandoned the lease agreement for the sole reason that the charter service proved unprofitable, even though he testified to the contrary. The Ninth Circuit found that:

> In a letter to Pring, Starr explained he would make no more payments because the airplane was unprofitable and was going to be sold. In light of that letter and Starr's testimony on cross-examination, the factual finding was not clearly erroneous.

Petition for Certiorari, Appendix, at 2.

In view of the strong evidence to the contrary, the District Court gave little weight to Starr's assertion that the condition of the plane was the reason for cessation of his performance under the lease.

There can be no question that the District Court's finding was based on competent evidence, was not clearly erroneous, and cannot be disturbed on appeal. In view of this fact, petitioners' invocation of an assortment of constitutional provisions, and federal aircraft laws and regulations is utterly irrelevant and inappropriate.

Finally, Petitioners' argument that the Ninth Circuit's interpretation of the relevant Idaho law is erroneous is similarly without merit. Even if the trial court's crucial finding of fact was erroneous, the Ninth Circuit correctly interpreted Idaho law as required under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), holding that there was no failure of consideration under the rule of *Transamerica Leasing Corp. v. Van's Realty Co.*, 91 Idaho 510, 427 P.2d 284 (1969). Therein the Idaho Supreme Court held that there can be no failure of consideration when a lessor purchases specific property upon the selection and at the request of the lessee. The fact that the

lessee chose faulty or improper equipment (or miscalculated his financial ability to perform under the lease) cannot form the basis of a claim of failure of consideration. The record below clearly reflects that this case falls squarely within the holding of *Transamerica.* Defendant Starr selected and tested the aircraft prior to entering into the lease agreement and plaintiff purchased the plane pursuant to the contract.

Though unnecessary to its holding below, the Ninth Circuit's interpretation of Idaho law was clearly correct and plaintiffs' assertions to the contrary are without merit.

## CONCLUSION

This is a diversity case involving a straightforward finding of fact by the trial court—a finding of fact held to be justified under Fed. R. Civ. P. 52(a) by the Ninth Circuit Court of Appeals. Petitioners' attempt to raise constitutional and statutory issues involving federal regulation of aircraft is utterly unjustified and should be summarily rejected by this Court.

For the reasons set forth above, Respondent urges that the Petition for Certiorari to the Ninth Circuit Court of Appeals be denied.

Respectfully submitted,

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